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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 907.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## REPLY BRIEF FOR PETITIONER.

### I.

### CORRECTIONS.

**Many Statements in Respondent's Brief Require Correction.**

A.

Respondent's brief, pages 5 and 16, states that the 10¢ division was only exacted on shipments moving on and after October 19, 1928 on the 32.5¢ rate. This is incorrect.

The Illinois lines exacted 10¢ on all shipments moving after August 15, 1928 on the 37¢ rate, and continued the practice as to the shipments here involved that moved on the 32.5¢ rate. Debtors' Exhibit No. 74 shows these facts (R. 512, 513). By stipulation an agreed statement was printed in the record in lieu of this exhibit which was voluminous and difficult to print. That agreed statement (R. 512, 513) refers to shipments moving in August 1928, **while the 37¢ rate was in effect,** and reads in part, as follows:

> "The exhibit shows that all of these particular cars moved at a time when the through rate on crude oil from Wickett, Texas, to Whiting, Indiana, was 37¢ per cwt., being about three weeks before the reduced rate of 32½¢ per cwt. went into effect.
>
> "The exhibit further discloses that at this time the Illinois Lines were cutting debtor's freight bills handled on junction settlements, from a demand for 30½¢ for service south of East St. Louis to 27¢, allowing only 27¢ for such service and retaining 10¢ for the service north of East St. Louis."

Prior submission of the reduction in the rate to the Illinois lines was not necessary because their revenue was not affected (R. 119, 120, 419). Their participation in the reduced rate duly published as required by the Act to Regulate Commerce constituted concurrence (R. 59, 60).

B.

Respondent states (B. 5) that its division was specifically 9.1¢. It is equally true that petitioner's division was specifically 16.9¢. Respondent had no right to reduce petitioner's revenue because of the action of the Illinois lines and petitioner did not ask respondent to reduce its revenue. We asked it to collect the proper revenue and give each carrier its agreed division. Mr. Oliver so testified (R. 346 Top), to-wit:

> "I contend it was the duty of the Cotton Belt to collect 26¢, retain 9.1 and give the Texas and Pacific 16.9."

The Illinois Trunk Lines were only in a position to enforce their demand for a 10¢ division because of respondent's action in altering the waybills and making junction settlement at East St. Louis. If the shipments had been allowed to go through on the original waybills the E. J. & E. R. R. Co. would have been the settling carrier. Respondent's argument (B. 5) that it might have charged the loss caused by the Illinois Trunk Lines withholding 10¢ in a number of ways, ignores respondent's obligation to collect 26¢ and also ignores the fact that it had no right to reduce the revenue of any prior carrier.

C.

On page 6 of its brief, respondent seeks to limit the application of Rule 118 to shipments moving on through billing. There is no such limitation in the language of the rule. It applies in all cases to "the waybill destination carrier * * * regardless of the final destination of the shipment." Hence the rule applies where the waybill terminates at a junction point just the same as when the waybill terminates at final destination.

D.

Respondent's statement (B. 7) that these junction settlements enabled petitioner to receive its proportion of the revenue earlier than if the waybill had gone through is also incorrect. Rule 106 (R. 196) requires that settlements between carriers be made on or before the 25th of the succeeding month. This rule applied whether petitioner got settlement from respondent following a junction transfer at East St. Louis or from the EJ&E following delivery at Whiting. In either case, petitioner could

not get its money until the 25th of the succeeding month. Respondent, however, by these junction freight settlements got its money at the close of the week's business.

E.

Respondent states (B. 8) that the divisions being in dispute, it had no option under Rule 143 (R. 571) other than to accept the settlement offered by the Illinois lines. Petitioner has always been of the opinion that the action of the Illinois trunk lines was so arbitrary and in violation of the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4, and Sec. 15, Par. 6), as well as of elementary principles of contract law, that it raised no legitimate dispute as to the applicable divisions. Petitioner regards the cutting of respondent's freight bills by the agent of the Illinois trunk lines at East St. Louis as a plain and inexcusable breach of contract. Assuming for argument, however, that divisional dispute existed, respondent's duty to accept the settlement offered was not final but only temporary "pending agreement" (Rule 143, R. 571). The duty still rested upon respondent to obtain correction (Rule 137, R. 570), and to demand judgment (Rule 141, R. 571). We contend that the settlement offered by the Illinois trunk lines being incorrect due to the incorrect changes made in the freight bills by the agent of the Illinois lines at East St. Louis, respondent should have demanded adjustment in accordance with Rule 141 (R. 571) and proceed to obtain correction as per Rule 137 (R. 570), and when correction was refused, respondent should have brought suit. Respondent did none of these things. Therefore, we submit we are justified in our statement that instead of collecting and dividing the proper revenue, respondent acquiesced in the cut and charged part of the loss against petitioner without its consent.

F.

Respondent states (B. 11 and 12) that the issue now raised by petitioner was raised before the arbitration committees (R. 266, 267 and 308). It is true that in its brief before these committees, petitioner put the question quoted at the bottom of page 11 and top of page 12 of respondent's brief as Issue E, to-wit (R. 308):

> "In a case where a carrier makes delivery to a connection at a junction point in junction settlement and renders **an incorrect interline settlement,** because of the fact that the connection has arbitrarily retained excessive revenue, is the carrier making such incorrect interline settlement responsible, under the rules, to carriers up to junction point for correct accounting and correct distribution of revenue or must the carriers up to the junction point proceed against the carrier that has retained excessive revenue?"

It is equally true, however, that the arbitrators refused to decide the above question. Nowhere in the opinions of any of these arbitrators do we find any decision as to whether or not the settlement rendered us by respondent was "an incorrect interline settlement." The arbitrators thought this was a legal question beyond their jurisdiction. Obviously, therefore, their decisions are not conclusive on this issue and the court below should have decided this issue.

G.

The quotation from Arbitrator Streicher's opinion in respondent's brief, page 14, is distorted by parenthetical interpolation. If the court will read the whole paragraph from which this quotation is taken (R. 225) and also Question (e) (R. 224) which Arbitrator Streicher was answering, it will be clear that by the expression "settling carrier" he meant respondent.

## II.

## THE DECISIONS OF THE ARBITRATION COMMITTTES.

The questions presented herein are as set out on pages 2 and 3 of the Petition and not as formulated on page 2 of respondent's brief. The challenge here is not to the award of the arbitration committees but to the opinion of the Court of Appeals holding that the issues herein were adjudicated by that award, nor is this claim grounded solely on the accounting rules as respondent so often states in its brief. Our right of action arises out of the common law liability of a waybill destination carrier to collect the freight and divide according to agreed divisions and Rule 118 is but declaratory of this common law obligation. (See Point II, page 28 et seq., Petitioner's Brief herein.)

The arbitration in this case was but a preliminary proceeding to obtain an interpretation of the accounting rules (Rules 272, 280, 281, R. 572). The inclusion of this procedure in the mandatory accounting rules is similar to the inclusion of provisions in contracts for the arbitration of disputes over technical matters and which are often held to be conditions precedent to a right of action on the contract or liability. See Palmer v. Fix, 286 Pac. (Cal.) 498, Syllabus 11, l. c. 501, Paragraph 11, where the Court described this type of arbitration as follows:

> "There is, however, an exception to this settled principle of law, that 'where a contract contains a stipulation, **not** that all questions arising thereunder, whether as to the validity or effect of such contract or otherwise, shall be submitted to arbitration, **but** that the decision of arbitrators on a certain question or questions, such as the quantity, quality, or price of materials or workmanship, the value of work, the amount of loss or damage, or the like, shall be a condition precedent to the right of action on the contract

itself, no fixed sum being stated in the contract, such stipulation will be enforced, because the parties to a contract have a right to adopt whatever method they see fit for determining such questions, and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract.' Davisson v. East Whittier Land & Water Co., 153 Cal. 81, 96 P. 88. This rule finds sanction in Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Blodgett Co. v. Bebe Co., supra."

Wabash Railway Co. v. American Refrigerator Transit Co., 7 Fed. 2nd 335, and similar cases cited in the opinion below and in respondent's brief are obviously not in point. Those were so-called common law arbitrations whereby all issues were submitted under an arbitration agreement to arbitrators who were invested with jurisdiction to decide them. The proceeding before these arbitration committees in this case, however, was not such an arbitration, nor was it a proceeding under the Federal Arbitration Act, 9 U. S. C. A., Sec. 2, because not being pursuant to "a written provision" in a contract of the type described in Section 2 of the Federal Arbitration Act "to settle by arbitration" a controversy arising out of such a contract "or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract," these proceedings were obviously not within the terms of the Federal Act.

The proceedings before these arbitration committees were a limited arbitration of the type described in Palmer v. Fix, supra, and we submit that such a limited arbitration binds the parties only as to the particular matters over which the arbitrators are given jurisdiction. It is apparent from Rules 272, 280 and 281, supra, that these arbitration committees were not given any power to decide upon petitioner's legal right to a full accounting from respondent.

## III.

## RESPONDENT'S DUTY TO COLLECT FROM THE ILLINOIS LINES WAS A PART OF ITS CONTRACT.

Respondent in its brief, page 16, and the Court below in its opinion, state that the divisional contract contained no provision imposing upon appellee the duty to collect from the Illinois lines (R. 598). It is true that no such provision was expressly written into the divisional contract. We submit, however, that the contract fixed the divisions accruing to the several carriers participating in the through rate, and it contemplated that the waybill destination carrier would collect in accordance with the divisional agreement. It is implied in every contract for the division of a through rate that the settling carrier will account to prior lines in accordance with agreed divisions. Such an obligation is implied in every divisional agreement and the accounting rules relied on in this case are but declaratory of that obligation.

Respondent does not deny that under its agreement with petitioner, petitioner was entitled to a division of 16.9¢ out of the portion of the through rate lawfully accruing to East St. Louis, at which point respondent terminated the waybills and made settlement with the Illinois lines. Respondent does not deny that petitioner has lost a substantial portion of that revenue. It contends, however, as it has in previous stages of this case, that petitioner's right of action is against the Elgin, Joliet & Eastern Railway Company. We anticipated this argument and answered it under Point II, page 18 et seq. of the Petition herein, and also under Point II, page 28 et seq. of Petitioner's Brief herein, to which we again make reference. The fallacy in respondent's whole argument on this point lies in the fact that respondent fails to distinguish between shipments handled to destination under through waybills,

and shipments handled to a junction point short of final destination under waybills that terminate at such junction point. As to the latter, the inbound carrier at the junction collects the freight up to the junction and **settles** with prior lines. Lines prior to the junction point receive no accounting and have no right of action against the carrier at final destination. The initial carrier and the carrier at final destination are parties to separate transportation movements and there is no privity between them, and such was the practice followed in this case. Petitioner received no accounting from the destination carrier, the Elgin, Joliet & Eastern Railway Company. The only accounting petitioner received was from respondent and the very fact that respondent rendered us an accounting establishes that respondent recognized that it was to it that we had a right to look for collection and account.

We tried to point out in the Petition and supporting Brief that the questions in this case are important, that questions of local law have been decided below in a manner that is untenable and probably in conflict with the state law as yet unannounced by the Missouri courts. Also that the case presents an important question of Federal law concerning divisions of through rates established in accordance with the Act to Regulate Commerce, that ought to be settled by this court. Nowhere in respondent's brief does it seriously question the importance of the questions here presented for review, and we respectfully submit that this case calls for the exercise of the supervisory power of this Court, and that certiorari should be granted.

Respectfully submitted,

CHARLES M. SPENCE,
THOMAS BOND,
Attorneys for Petitioner.

THOMPSON, MITCHELL, THOMPSON & YOUNG,
Of Counsel.